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IN THE

Supreme Court of the United States

October Term, 1965.

No. 629

IN THE MATTER OF THE APPLICATION
OF
KIMBERLY STEIN, a minor, by AUDREY H. STEIN, his parent and next friend, *et al.*,
Petitioners-Appellants,
against
ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York,
and
MAX J. RUBIN, *et al.*, constituting the Board of Education of the City of New York,
and
BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Defendants-Appellees.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—RE 2-6978—1965

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Kimberly Stein, *et al.*, petitioners and appellants in this proceeding, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals, Second Circuit, entered on July 7, 1965, which reversed the final order, judgment and decree of the United States District Court for the Eastern District of New York entered January 28, 1964 (Bruchhausen, J.), which (1) denied the defendants' motion to dismiss the plaintiffs' amended complaint for legal insufficiency; (2) granted the plaintiffs' motion for summary judgment; (3) adjudged and declared that the infant plaintiffs have a constitutional right to offer a prayer voluntarily each day in their respective classrooms in public schools; (4) enjoined the defendants from interfering with prayers voluntarily offered to God each day by the infant plaintiffs in their respective classrooms; and (5) directed the defendants to offer the infant plaintiffs an opportunity to pray voluntarily to God each day in their respective classrooms while in public school. The prayers and the right of the infant plaintiffs to offer them were made subject "to such reasonable rules and regulations as may be prescribed by the school authorities."

Opinions Below.

The opinion of the District Court is reported in 224 Fed. Supp. 757 and is set forth herein as Appendix A. The unreported opinion of the Circuit Court of Appeals is annexed hereto as Appendix B.

Jurisdiction of This Court.

The order of the Court of Appeals reversing the District Court was entered on July 7, 1965. Jurisdiction to review the judgment of the United States Court of Appeals, Second Circuit, is conferred on this Court by Title 28, U. S. C., Section 1254.

Questions Presented.

1. May the State without good cause and solely as a matter of law ban all prayers in public schools and in effect deny children attending public schools the opportunity to voluntarily offer a prayer of their own choosing to God while in school and does such ban constitute:

(a) A denial of the free exercise of religion and a denial of the right of free speech guaranteed to said children and their parents by the First and Fourteenth Amendments to the Constitution of the United States?

(b) An interference with the paramount parental right over the education of his child recognized by this Court in *Pierce v. Society for Sisters,* 268 U. S. 510.

2. Does the 1st amendment as interpreted by this Court in *Engel v. Vitale,* 370 U. S. 421, and *Abington School District v. Schempp* and *Murray v. Curlett,* 374 U. S. 203, require the banning of all prayers in public schools?

3. Is not the decision of the United States Court of Appeals, Second Circuit, decided on July 7, 1965 and unreported as yet in violation of the First and Fourteenth Amendments to the United States Constitution.

4. Do the rights of free exercise of religion, free speech and equal protection of the laws prescribed in the First and Fourteenth Amendments of the United States Constitution require an accommodation to the religious needs of parents and children attending public schools subject to such reasonable rules and regulations as may be prescribed by the school authorities and is such accommodation within the doctrine of neutrality discussed by this Court in *Abington School District v. Schempp* and *Murray v. Curlett, supra?*

Constitutional and Statutory Provisions Involved.

The First Amendment to the Constitution reads in part as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *."

The first section of the Fourteenth Amendment to the United States Constitution reads as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The act of the principal in banning all prayers and the support given to his position by the City Board of Education and the State Board of Regents is an amorphous practice without the guidelines of any statute or law.

Statement of the Case.

The Facts.

Petitioners are children attending classes as students at P. S. 184, Whitestone, New York. The defendants are Elihu Oshinsky, Principal of P. S. 184, Whitestone, New York, The Board of Education of the City of New York and the Board of Regents of the State of New York.

The defendant Oshinsky, in October, 1962, after the Supreme Court of the United States had decided *Engel v. Vitale,* 370 U. S. 421, but prior to the decision in *Abington School District v. Schempp* together with *Murray v. Curlett,* 374 U. S. 203 (1963), ordered all of his teachers to stop all children in the school from reciting prayers in their classrooms. The principal's order at first applied to simple prayers of grace said by the children before they ate their milk and cookies. The prayers were two in number. They were:

"GOD IS GREAT, GOD IS GOOD
AND WE THANK HIM FOR OUR FOOD, AMEN."

which was recited by kindergarten children in morning sessions and

"THANK YOU FOR THE WORLD SO SWEET
THANK YOU FOR THE FOOD WE EAT
THANK YOU FOR THE BIRDS THAT SING
THANK YOU GOD FOR EVERYTHING"

which was recited by kindergarten children in afternoon sessions.

The actions of Mr. Oshinsky were upheld by the defendant New York City Board of Education and by the defendant Board of Regents.

The parents of the infants thereupon caused a Notice to be served upon defendants demanding that their children be given "an opportunity to express their love and affection to Almighty God each day through a prayer in their respective classrooms." The original Notice and proof of service was submitted to the Court and a copy thereof annexed to the complaint and marked "Exhibit A" (31a).* The said notice was served on behalf of children in various grades of P. S. 184. Eight of the infant petitioners were in the kindergarten, two in the first grade, four in the

* Reference is to appellees' appendix in the Circuit Court of Appeals record.

second grade, two in the third grade, two in the fourth grade, three in the fifth grade and one in the sixth grade. All demanded "an opportunity to express their love and affection to Almighty God." The instant action by infant petitioners is based upon that written notice on behalf of themselves and all others similarly situated. The infant petitioners and their respective parents are members of the Protestant, Roman Catholic, Jewish, Armenian Apostolic and Episcopalian faiths.

Originally, the demand was refused on the ground that the issues of prayers in school and Bible reading in schools were before the Supreme Court of the United States for determination and hence prayers "may be unlawful." Since the Supreme Court decided *Abington School District v. Schempp* together with *Murray v. Curlett, supra,* there has been no change in the policy of the defendants.

The amended complaint alleged and was deemed admitted for the purposes of the motions before the District Court that the defendants "had instituted a policy of banning prayers in public schools of the City of New York and of the State of New York, even where the opportunity to pray is sought by the students themselves." The complaint was filed on March 14, 1963. The amended complaint was filed on March 29, 1963. The defendants moved for an order to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. The petitioners moved for summary judgment pursuant to Rule 56 the Federal Rules of Civil Procedure in that all the facts alleged in the complaint were deemed admitted and there were no genuine issues of any material fact.

The District Court accepted jurisdiction under the Civil Rights Statutes, 42 U.S.C.A. 1983 and 28 U.S.C.A. 1343 and held that the complaint did sufficiently raise a claim of denial of constitutional rights to the free exer-

cise of religion and to freedom of speech to warrant exercise of federal jurisdiction for the purposes of adjudicating it. The opinions of the District Court and the Circuit Court of Appeals both held that the establishment clause of the First Amendment to the United States Constitution would not prohibit New York from permitting in its public schools prayers such as those here at issue.

Reasons for Granting the Writ.

Petitioners submit (1) that the United States Court of Appeals, Second Circuit, has decided Federal questions of great substance not heretofore specifically determined by this Court or in the alternative (2) that the Court of Appeals has decided those questions in a way which is not in accord with applicable decisions of this Court and is in conflict with the First and Fourteenth Amendments to the Constitution, and (3) that the suppression of voluntary prayer in school by an administrative official where there are no statutes or reasonable and definite standards to guide his action and without a proper governmental objective is an amorphous practice constituting a prior restraint and an abridgment of First Amendment guarantees and is an interference with the paramount parental right over the education of his child recognized by this Court in *Pierce v. Society of Sisters*, 268 U. S. 510.

1. The federal questions herein have not heretofore been specifically determined by this court.

The issues here are important as they involve the delicate balance that must be struck between free exercise of religion and the prohibition against the establishment thereof. This Court has duly noted the importance of these issues by recently granting writs of certiorari and deciding sev-

eral cases involving the same delicate balance, including *Engel v. Vitale,* 370 U. S. 42 (1962), and *Abington Township v. Schempp* and *Murray v. Curlett,* 374 U. S. 203 (1963). For the reasons stated below, these and other recent decisions of this Court in this area do not govern the important issues in the case at bar, but, like those cases, this case involves the intrusion of the State into the field of religion. Most importantly, this case involves the adoption of a policy by the Board of Regents of the Empire State, and subordinate educational authorities, with the primary purpose and effect of absolutely prohibiting the free exercise of religion in the public schools. The practice of religion sought to be allowed and barred by the State in this case does not originate with the State or find sanction or support in state statutes or rules. Rather, the State has interposed itself between persons who wish to say a prayer and the saying of that prayer. Such interposition is, in this case, without support of justifiable reason, but is solely based upon, it is submitted, a wrongful extension and misconstruction of recent opinions of this Court so as to bar religious practices in the public schools no matter their form, origin or circumstance.

2. The Circuit Court of Appeals has decided those questions in a way which is not in accord with applicable decisions of this Court and is in conflict with the First and Fourteenth Amendments to the Constitution.

The prior cases before this Court which come closest to presenting a question similar to that in this case would seem to be *Engel v. Vitale,* 370 U. S. 421 and *Abington School District v. Schempp* together with *Murray v. Curlett,* 374 U. S. 203. The *Engel* case involved the "Regents Prayer" wherein the Board of Education of Union Free School District No. 9, acting in its official capacity *directed* the school district's principal to cause

the said "Regents' 'Official Prayer'" to be said aloud in the presence of a teacher at the beginning of each school day.

In the *Engel* case the defendant Board of Regents herein had recommended the recital in public schools of an official "Regents Prayer" composed under its supervision. The irony is that in the case at bar, the same New York Board of Regents has now directed the banning of all prayers, even voluntary prayers of the children's own choice, in all New York public schools.

The *Abington* and *Murray* cases decided the validity of state statutes and rules and regulations requiring the recitation of prayers and Bible reading programs.

Petitioners contend that a program of voluntary prayers which is initiated, planned and conducted by the pupils without initiation, leadership, direction, planning, requirement or programming by the State is materially different from the programs ruled unconstitutional in the *Engel, Abington* and *Murray* cases and it was not the intention of this Court to ban all prayers or prayers of the people from our public schools nor is it the policy of this Court to permit a state to prohibit the free exercise of religion or the right of free speech to its populace or to its children in public school.

The defendants have taken Mr. Justice Black's dicta of *Engel v. Vitale*, 370 U. S. 421 (435):

> "It is neither sacriligious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance"

to mean that "no prayers of any kind, official or voluntary, are to be sanctioned in Public School" and in doing so

have violated Mr. Justice Black's further injunction of "leaving that purely religious function to the people themselves" by depriving petitioners and all others of all right to pray in public schools.

The Court below speaks of the "separation of church and state" (see Appendix B, p. 34):

> "After all that the states have been told about keeping the 'wall between church and state * * * high and inpregnable,' *Everson v. Board of Education*, 330 U. S. 1, 18 (1947), it would be rather bitter irony to chastise New York for having built the wall too tall and too strong."

It is respectfully submitted that this case is not a church and state case, but rather a "peoples free exercise of religion versus interference by the state case." As such it is not an "establishment" case but a "free exercise" case. Because it is a "free exercise case" it is therefore a "free speech" case.

This Court has discussed the Doctrine of Neutrality in *Abington School District v. Schempp, supra,* at page 222 where Mr. Justice Clark propounds a test for same:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment: If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."

Mr. Justice Clark also states at page 225:

> "We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.' *Zorach v. Clausen, supra,* at 314. * * * neither aiding nor opposing religion."

At page 226:

> "In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment."

In the instant case the State has, in its action banning prayers, enacted a rule to which Mr. Justice Clark's question is to be put—"What is the purpose and primary effect of the enactment?" The answer is: The banning of prayer voluntarily sought to be offered by the pupils themselves. Petitioners contend that such enactment has as its purpose the preferment of those who do not believe in God over those who do believe and as its primary effect it uses the awesome power of the state to thwart the free exercise of religion and free speech of pupils attending public school.

The First Amendment, as applied to the states through the Fourteenth Amendment, forbids not only laws "respecting an establishment of religion" but also those "prohibiting the free exercise thereof." Thus the State must not burden one's right to life, liberty and property, to free speech, a free press, freedom of worship and other fundamental rights except to prevent grave and immediate danger to interests which the State may lawfully protect.

Sherbert v. Verner, 374 U. S. 398, decided the same day as the *Schempp* and *Murray* School Prayer cases, contains the most recent pronouncements of this Court on the application of the free exercise clause of the First Amendment.

Adele H. Sherbert, a Seventh Day Adventist, was discharged by her employer for her refusal to work on Saturday and was refused unemployment compensation by the South Carolina Employment Security Commission

on the ground that her refusal to work on Saturdays, causing other employers to refuse to hire her, disqualified her for failure to accept suitable work. She ultimately appealed to this Court on the grounds of an interference with the free exercise of her religion guaranteed her by the First Amendment as made applicable to the states by the Fourteenth Amendment.

Mr. Justice Brennan speaking for the majority pointed out that First Amendment rights are not easily subject to state interference or regulation.

> "Conduct or actions so regulated have invariably posed a substantial threat to public safety, peace or order" 374 U. S., p. 403.
>
> "It is too late in the day to doubt that liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or a privilege. * * *" 374 U. S. 404.
>
> "Only the gravest abuses endangering paramount interests, give occasion for permissible limitation." *Idem,* p. 406.

Dr. Leo Pfeffer, one of the most ardent advocates of the doctrine of separation of church and state who has appeared before this Court in almost every Church-State issue of our time, in testifying on April 30, 1964 before the Judiciary Committee of the U. S. House of Representatives, Second Session of the 88th Congress, in connection with the Becker and other proposed Amendments to the First Amendment to the Bill of Rights, had this to say:

> "I have to add a sixth fiction which I shall mention first. A completely erroneous assumption which seems to be prevailing among those who testified here, and I am afraid among some members of the committee. A completely erroneous assumption that the Supreme Court or any decision of the

Supreme Court or any courts of the United States from the lowest to the highest courts have forbidden children to read the Bible or pray in public schools.

"Nothing could be further from the truth. *There is not one word in any decision of the Supreme Court including Murray, Engel, Zorach, or McCollum, or any State court decision which can, to any extent, be interpreted as forbidding children to pray or to read the Bible in the public schools.* (Italics supplied.)

"I suppose if in the middle of an arithmetic class a child got a feeling, a need of praying out loud and would do so, I presume it would be within the authority of the schoolteacher to say to him, 'This is not the time to do it.' But subject to the obligation not to disturb the ordinary course of the school curriculum nothing in the Supreme Court decision—

"The Chairman. What did it do?

"Mr. Pfeffer. All it says is that the State through its agencies cannot *promote* or *establish* the reading of the Bible or recitation of prayers. Nothing at all to the effect that the *children may not of their own or at the request of their parents, who have the primary obligation, may not pray in the public school, subject, as I say, to the necessity of discipline. This is the whole basis of the first amendment.* (Italics supplied.)

"The first amendment has two parts. One part says Congress shall make no law respecting an establishment of religion and the other says no law prohibiting its free exercise. If a child felt it necessary to say a prayer before partaking of bread or milk or cookies and the State says you can't do that, that would be a violation of the free exercise clause and just as unconstitutional as the Supreme Court says in Murray it is for the teacher to say

to the children that you will now say grace or read from the Bible.

"The first amendment's guarantees secure rights to the individual and restricts the State. They are against statism. They say to the State in the matter of religion you keep your hands off. This is the sacred right, the sacred duty of each individual as a creature of God who alone can decide whether his child shall pray and what form the prayer shall be, if they read the Bible what version of the Bible.

"Hence, there is nothing in these decisions, and I challenge any person to find one word in them which interferes with any person's 'religious liberty' to pray or worship as he sees fit, subject again to the qualification that in exercising his right he may not disturb his neighbor who at that time may be reading history or grammar and would be disturbed by a vocal prayer." (Italics supplied.)

School Prayer Hearings, Part I, pp. 923, 924.*

Also testifying at the School Prayer Hearings other authoritative voices on Constitutional Law agreed:

Paul G. Kauper, Professor of Law, University of Michigan Law School:

"There is merit to the argument that if the public schools are indifferent to the religious factor in the life of the Nation, they are thereby contributing to an official philosophy of secularism and, therefore, are not being really neutral in religious matters. But on this point the question is whether the kinds of religious practices, authorized by the proposed amendment, contribute in any substantial way to

* References are to transcript of hearings before the Committee on the Judiciary, House of Representatives, 88th Congress, Second Session, on proposed amendments to the Constitution relating to prayers and Bible reading in the public schools in three parts entitled School Prayers and printed by the Government Printing Office.

neutralize secularistic tendencies of public school education and whether there are not more effective means of doing this without using the compulsive authority of the public school system to sanction sectarian practices. *The Supreme Court, it should be emphasized, has not held that there can be no prayers in public schools. Nothing in the Court's decision precludes school authorities from designating a period of silence for prayer and meditation or even for devotional reading of the Bible or any other book during this period.* (Italics supplied.)

"Indeed, it may be that consistent with the Court's decisions, as indicated by the Stein *case, schools may permit opportunity for voluntary participation in prayers of the students' own choice where the school authorities are not directly involved in prescribing the kind of prayer or in giving direction to it.* (Italics supplied.)

School Prayer Hearings, Part II, p. 1692, May 15, 1964.

3. The suppression of voluntary prayer in school by an administrative official where there are no statutes or reasonable and definite standards to guide his action and without a proper governmental objective is an amorphous practice constituting an abridgment of First Amendment guarantees, and is an interference with the paramount parental right over the education of his child recognized by this Court in *Pierce v. Society of Sisters*, 268 U. S. 510.

The Circuit Court of Appeals relied on *Poulos v. New Hampshire*, 345 U. S. 395, in support of its decision. That case was decided on procedural grounds and is

authority against the suppression of First Amendment guarantees. Mr. Justice Reed speaking for the majority said:

> "Regulation and suppression are not the same, either in purpose or result, and courts of justice can tell the difference" (p. 407).

Mr. Justice Black in his strong dissent in *Poulos* stated:

> "I do not challenge the Court's argument that New Hampshire could prosecute a man who refused to follow the letter of the law to procure a license 'to run businesses,' 'erect structures,' 'purchase firearms,' 'store explosives' or I may add, to run a pawnshop. But the First Amendment affords freedom of speech, a special protection; I believe it prohibits a state from convicting a man of crime whose only offense is that he makes an orderly religious appeal after he has been illegally, 'arbitrarily and unreasonably' denied a 'license' to talk. This to me is a subtle use of a creeping censorship loose in the land."

More in point with the case at bar is *Niemotko v. Maryland,* 340 U. S. 268, wherein this Court unanimously reversed a conviction of members of Jehovah's witnesses for disorderly conduct for using a public park for Bible talks without a permit.

Application for a permit had been denied by municipal authorities in the exercise of a power derived, not from a statute or an ordinance, but from a local practice not defining any standards or limitations. Mr. Chief Justice Vinson speaking for the Court held:

> "In the instant case we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amorphous 'practice' whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations, no circumscribing

> of this absolute power; no substantial interest of the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here" (pp. 271 and 272).

And in *King v. New York,* 340 U. S. 293, 295, this Court held:

> "We are here concerned with suppression not punishment. It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action."

The issue of whether the authorities did act within their powers on the issue of permitting "voluntary prayers" has not been determined by this Court.

However, this Court has previously spoken on the subject of school authorities depriving infant students of their civil liberties. *Bolling v. Sharpe,* 347 U. S. 497, where this Court held at page 399:

> "Liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for a proper governmental objective."

In that case this Court held that:

> "Segregation in public school is not reasonably related to any proper governmental objective and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

Petitioners submit that in the instant case, the banning of prayers, the censorship imposed upon the minds of children, the prohibition of the free exercise of religion and of free speech by refusing the children an opportu-

nity to pray cannot be reasonably related to any "proper governmental objective" and likewise imposes on petitioners "a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

The amorphous practice of banning prayers by school authorities conflicts with the parent's right of control over their children and the right of privacy of the child. When parents encourage a child to recite a prayer before their meals and the child is told that he may not openly recite these prayers in school, there is an interference with these rights. The reach of the decision of school authorities in effect has gone beyond the hours of "nine to three." In effect this form of prayer and all prayer at home, in church and in the child's daily life has been discouraged as the child, quite obviously, tends to give great importance to the decisions of school authorities. The effect of this practice destroys the parent's right to have the child feel that God is with him the whole day long as well as the parent's right to have the child develop religious beliefs and religious expression. It further destroys the right of the child's privacy in that the school authorities have reached the developing religious education of the child and impaired it. See *Pierce v. Society of Sisters,* 268 U. S. 510, where the Court said at page 535:

> "The fundamental theory of liberty upon which all government in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instructions from public school teachers only. The child is not the mere creature of the state. Those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations."

The case of *Pierce v. Society for Sisters* was recently cited with favor by this Court in *Griswold v. Connecticut,* 381 U. S. at 481 and 482.

Hence, petitioners are entitled to a few moments each day in public school to express their love and affection to God through a voluntary prayer of their own choice.

Conclusion.

Since the State requires the attendance of Petitioners' children from 9:00 A. M. to 3:00 P. M. of each school day and thus pre-empts the greater part of their learning time, the school authorities are required to afford the free exercise of religion to those who request it during the pre-empted time. When the school authorities refused to prescribe any conditions whatsoever and instead banned all prayer, they not only ignored the request of the parents but they completely ignored their Constitutional duty.

The school authorities may neither absolutely ban nor absolutely deny opportunity for expression to children who seek to exercise their First Amendment rights. Since the children must yield to the compulsory education law and the paramount right of the school authorities to schedule and control the school day; the school authorities must yield to the Constitution and the paramount right of the children to be afforded an opportunity for religious expression when they or their parents so request.

We go so far as to say that banning prayer, or refusing to afford an opportunity to pray, is actually to set a scholastic framework which is other than neutral and is, in itself, unconstitutional. While the schools may not be forced to teach a certain response to God, they may not suppress all response.

The Establishment of "no response" is as unconstitutional as the Establishment of "official response."

Petitioners submit that this case *(Stein v. Oshinsky)* can distinguish *Engel v. Vitale (supra)* and *Abington School District v. Schempp* and *Murray v. Curlett (supra)*, in the same manner that *Zorach v. Clauson*, 343 U. S. 306, distinguished *McCollum v. Board of Education*, 333 U. S. 203, and thereby perform a distinct service to the religious needs of the people of the United States.

In light of the foregoing, it is respectfully submitted, that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

KIMBERLY STEIN, a minor by AUDREY H. STEIN, his parent and next friend, *et al.*,

Plaintiffs,

against

ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York;

and

MAX J. RUBIN, *et al.*, constituting THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

and

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Defendants.

No. 63-C-260.
December 20, 1963.

Appearances:

Edward J. Bazarian, Esq., Attorney for Plaintiffs.

Leo A. Larkin, Esq., Corporation Counsel, Attorney for Defendants Elihu Oshinsky, and Max J. Rubin, *et al.*, constituting the Board of Education of the City of New York, Joseph M. Callahan, Jr., Esq., Sidney P. Nadel, Esq., of Counsel.

John P. Jehu, Esq., Attorney for Defendant, Board of Regents of the University of The State of New York, Charles A. Brind, Esq., Counsel, State Education Department.

BRUCHHAUSEN, D. J.:

The infant plaintiffs seek a mandatory injunction, requiring the defendants to afford the plaintiffs an opportunity to express their love and affection to Almighty God each day through a prayer, voluntarily offered in their respective classrooms; an injunction, enjoining the defendants from interfering with the recitation of this prayer, and to declare such prayers constitutional. The defendants move to dismiss the complaint.

The facts indicate that the infant plaintiffs, students in P. S. 184, Whitestone, New York, were precluded from reciting a prayer pursuant to an order of the school principal. The prayers were as follows:

> "God is Great, God is Good
> And we thank Him for our Food,
> Amen."

The above prayer was recited by the kindergarten children in the morning classes prior to their partaking of milk and cookies.

The afternoon classes recited the following prayer:

> "Thank you for the World So Sweet
> Thank you for the food we eat
> Thank you for the birds that sing
> Thank you God for everything."

The New York City Board of Education and the Board of Regents of The University of the State of New York upheld the principal's ruling.

The infant plaintiffs by their parents demand an opportunity to express their love to God. These plaintiffs are

members of Protestant, Roman Catholic, Jewish, Armenian Apostolic and Episcopalian faiths.

The issue is whether the State may deny children attending public schools the opportunity to recite a daily prayer in classrooms, and does such denial constitute a prohibition against the free exercise of religion or a denial of free speech and finally does such ban conflict with the doctrine of neutrality required of a State in its relationship with its citizens.

It is alleged that this prohibition violates the free exercise clause and the free speech clause of the First Amendment of the Constitution of the United States as made applicable to the States by the Fourteenth Amendment of this document.

The defendants urge that this court is without jurisdiction because the complaint fails to allege the required monetary damage. It is well settled that an action brought pursuant to the Civil Rights statutes, 42 U.S.C.A. 1983 and 28 U.S.C.A. 1343(3), confers jurisdiction without the allegation or proof of any jurisdictional amount. *Douglas v. City of Jeanette, Pennsylvania, Pa.*, 1943, 319 U. S. 157; *Adams v. City of Park Ridge,* C. A. Ill., 1961, 293 F. 2d 585, 588; *American Federation of Labor, et al. v. Watson,* 327 U. S. 582, 590.

The defendants rely primarily upon the cases of *Engel v. Vitale,* 370 U. S. 421; *School District of Abington Township, Pennsylvania v. Schempp* together with *Murray v. Curlett,* both decided in 374 U. S. 203.

The facts in the *Engel* case, *supra,* established that the Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under State Law, directed the School District's principal to cause a prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day. This daily procedure was adopted on the recommendation of the State Board of Regents, a govermental agency, created pursuant to the State Constitution of the

State of New York. These state officials composed the prayer which they recommended and published as a part of their "Statement on Moral and Spiritual Training in the Schools," saying:

> "We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program."

Mr. Justice Black, writing for the Court in *Engel v. Vitale*, 370 U. S. 421, held in part at pages 430-431:

> "There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regent's prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is 'non-denominational' and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of govermental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct govermental compulsion and is violated by the enactment of laws which establish

an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive procedure upon religious minorities to conform to the prevailing officially approved religion is plain."

Subsequently in *Abington School District v. Schempp; Murray v. Curlett, Board of School Commissioners of Baltimore City,* 374 U. S. 203, the Court was again called upon to pass on the constitutionality of State statutes. The *Abington* case required a daily reading of at least ten verses from the Bible without comment, at the opening of each public school on each school day pursuant to Pennsylvania statute.

The *Murray* case required opening exercises in the schools of the city, consisting primarily of the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.

In both cases students were permitted to absent themselves or not take part in these exercises. The Supreme Court concluded both these cases violated the Establishment Clause by requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer in unison. These exercises were prescribed as part of the curricular activities of students, required by law to attend school. They were held in the school buildings under the supervision and with the participation of teachers employed in those schools. The State intended to institute a religious program and thus violated the Establishment Clause.

The case, at bar does not involve a State statute requiring the children or personnel to actively engage in or refrain from acknowledging their complete dependence upon God. It is merely a voluntary desire of the children without any coercion or pressure being brought to offer a prayer to the Almighty. It is in this light, the Court must decide whether the facts in this case constitute the establishment of religion prohibited by the First Amendment. The First Amendment provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

In *Zorach v. Clauson,* 343 U. S. 306, the Court at page 312 held in part:

> "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policeman who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty

> in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.' "

The Court further states at page 313:

> "We are a religious people whose institutions presuppose a Supreme Being."

The Court also, at page 314, held in part:

> "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competiton between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction."

See also *West Virginia State Board of Education v. Barnette,* 319 U. S. 624; *Holey Trinity Church v. United States,* 143 U. S. 457, 470, *Lawrence v. Buchmueller,* 243 N. Y. S. 2d 87; *Lewis v. Allen,* 159 N. Y. S. 2d 807.

The facts in his case together with the applicable law clearly indicate that the voluntary prayer offered by these

children is made without any compulsion and it is not prescribed by law, and does not tend to establish a religion in violation of the First Amendment.

Inasmuch as the School Board is invested with the power and obligation to conduct its affairs, including programming of classes and maintenance of discipline, the rights of the plaintiffs to say voluntary prayer must be subject to such reasonable rules and regulations as may be prescribed by the school authorities.

This opinion constitutes the findings of fact and conclusions of law.

The plaintiffs' motion for summary judgment is granted and defendants' motions are denied.

Settle order and decree on ten (10) days' notice.

APPENDIX B.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 457—September Term, 1964.

(Argued April 29, 1965 Decided July 7, 1965.)

Docket No. 28812

KIMBERLY STEIN, a minor by AUDREY H. STEIN, his parent and next friend, *et al.*,

Plaintiffs-Appellees,

v.

ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York,

and

MAX J. RUBIN, *et al.*, constituting the Board of Education of the City of New York,

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Defendants-Appellants.

Before:

Lumbard, Chief Judge,
Friendly and Anderson, Circuit Judges.

Appeal from an order of the District Court for the Eastern District of New York, Walter Bruchhausen, Judge, 224 F. Supp. 757 (1963), granting summary judgment to parents in an action by them to enjoin school officials from preventing the recitation of prayers on the children's initiative. Reversed, with instructions to dismiss the complaint.

Sidney P. Nadel (Leo A. Larkin, Corporation Counsel of the City of New York, Seymour B. Quel, Joseph M. Callahan, Jr., Benjamin Offner, of Counsel), for Defendants-Appellants, Oshinsky and Board of Education of the City of New York.

John P. Jehu (Charles A. Brind, Counsel, State Board of Education), for Defendant Board of Regents of the University of the State of New York.

Edward J. Bazarian, Flushing, N. Y., for Plaintiffs-Appellees.

Hahn, Hahn & Ford, Brooklyn, N. Y., filed brief for The Particular Synod of New York, Reformed Church in America as *amicus curiae*.

Stephen A. Hochman, New York, N. Y., filed brief for New York Civil Liberties Union as *amicus curiae*.

FRIENDLY, Circuit Judge:

The decision in *Engel v. Vitale*, 370 U. S. 421, condemning the "Regents' prayer" as violating the Establishment Clause of the First Amendment, held to be applicable to the states by the Fourteenth, was rendered on June 25, 1962, too late to affect the 1961-62 school year. The case now before us reflects a response to that decision by parents who think their children ought have some form of religious observance while in public school.

The amended complaint, filed in March, 1963, in the District Court for the Eastern District of New York, made the following allegations: The fifteen plaintiffs, of varying

religious faiths, are parents of twenty-one children, ranging from five to eleven years in age. The children attend Public School 184, at Whitestone, N. Y., in grades ranging from kindergarten to the sixth. The defendants are Elihu Oshinsky, principal of the school; the members of the Board of Education of New York City; and the Board of Regents of the University of the State of New York. On October 5, 1962, Mr. Oshinsky "ordered his teachers who were instructing the kindergarten classes to stop the infant children from reciting the simple and ancient prayer:

> 'God is Great, God is Good and We
> Thank Him for our Food, Amen!'

before they ate their cookies and milk in the morning session," and "ordered his teachers who were instructing the kindergarten classes for the afternoon session to stop the infant children from reciting the simple and ancient prayer:

> 'Thank You for the World so Sweet,
> Thank You for the Food We Eat,
> Thank Your for the Birds that Sing—
> Thank You, God, for Everything.' "

He also "ordered his teachers to stop the saying of any prayer in any classroom in P. S. 184, Whitestone, New York." The Board of Education and the Board of Regents have instituted a policy banning prayers in the public schools even when the opportunity to pray is sought by the students themselves, and by so doing have "condoned and/or directed" Mr. Oshinsky's actions. The plaintiffs had joined in a written demand to the defendants "that our children be given an opportunity to acknowledge their dependence and love to Almighty God through a prayer each day in their respective classrooms"; defendants had ignored this.

The defendants moved, under F. R. Civ. P. 12(b), to dismiss the complaint for lack of subject-matter jurisdiction and for failure to state a claim on which relief could be granted. Plaintiffs countered with a motion for summary judgment under F. R. Civ. P. 56, supported by an affidavit which added no allegations to those in the complaint and asserted that "the issues presented are purely Constitutional in nature and questions of law. No issues of fact are presented." Defendants filed no affidavits contradicting anything said in the complaint; they urged rather that the motion for summary judgment was premature and that their own motion did not admit the allegations of the complaint save for the purpose of raising the objections there stated. The court denied defendants' motion and granted plaintiffs', 224 F. Supp. 757 (1963). It signed an order prohibiting interference with prayer and requiring that a reasonable opportunity for it be provided each day, but stayed the order pending this appeal.

We see no force in defendants' argument that the posture of the case did not permit the grant of summary judgment to plaintiffs, whatever the merits of their claim and the adequacy of the showing in its support. Although F. R. Civ. P. 56(a) in its initial form would have postponed such a motion until answer had been filed, one of the purposes of the 1946 amendment was to permit a plaintiff to move for summary judgment while a pre-answer rule 12(b) motion was pending. 6 Moore, Federal Practice ¶56.07 (2d ed. 1953). We likewise cannot sustain defendants' contention that the complaint did not sufficiently raise a claim of denial of constitutional rights to the free exercise of religion and to freedom of speech "to warrant exercise of federal jurisdiction for purposes of adjudicating it" under 28 U. S. C. §1343(3). *Bell v. Hood*, 327 U. S. 678, 684 (1946). But we think the court erred in its ruling on the merits.

Plaintiffs say that *Engel v. Vitale, supra*, and the later decisions in *Abington School District v. Schempp* and *Mur-*

ray v. Curlett, both at 373 U. S. 203 (1963), held only that under the Establishment Clause of the First Amendment a state may not *direct* the use of public school teachers and facilities for the recitation of a prayer, whether composed by a state official as in *Engel* or not so composed but having a religious content as in *Abington* and *Curlett;* they argue that these decisions did not hold that a state could not *permit* students in public schools to engage in oral prayer on their own initiative. This may be true enough; if the defendants could prevail only by showing that permitting the prayers was prohibited by the Establishment Clause, the question would be whether the use of public property as a situs for the prayers, the consumption of some teacher time in preserving order for their duration, and the possible implication of state approval therefrom would attract the condemnation of *McCollum v. Board of Education,* 333 U. S. 203 (1948), or the benediction of *Zorach v. Clauson,* 343 U. S. 306 (1952), and *Sherbert v. Verner,* 374 U. S. 398, 409 (1963). Although we note in this connection defendants' serious contention that in the context of closely organized schooling of young children, "student-initiated" prayers are an illusion and any effective routine requires the active participation of the teachers, we shall assume, *arguendo,* in plaintiffs' favor that the Establishment Clause would not prohibit New York from permitting in its public schools prayers such as those here at issue. Nevertheless New York is not bound to allow them unless the Free Exercise Clause or the guarantee of freedom of speech of the First Amendment compels.

Neither provision requires a state to permit persons to engage in public prayer in state owned facilities wherever and whenever they desire. *Poulos v. New Hampshire,* 345 U. S. 395, 405 (1953). It would scarcely be argued that a court had to suffer a trial or an argument to be interrupted any time that spectators—or even witnesses or jurymen—desired to indulge in collective oral prayer. The case of the school children differs from that of spectators

—although not from that of witnesses or jurymen—in that, so long as they choose to attend a public school, attendance on their part is compulsory. N. Y. Educ. Law §§3201-29. But "the student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others." *Abington School District v. Schempp, supra,* 374 U. S. at 299 (concurring opinion of Mr. Justice Brennan). We are not here required to consider such cases as that of a Moslem, obliged to prostrate himself five times daily in the direction of Mecca, or of a child whose beliefs forbade his partaking of milk and cookies without saying the blessings of his faith. Cf. *Sherbert v. Verner, supra,* 374 U. S. at 399 n. 1. So far as appears, the school authorities might well permit students to withdraw momentarily for such necessary observances—or to forego the milk and cookies, just as they excuse children on holidays important to their religions.

Determination of what is to go on in public schools is primarily for the school authorities. Against the desire of these parents that their children "be given an opportunity to acknowledge their dependence and love to Almighty God through a prayer each day in their respective classrooms," the authorities were entitled to weigh the likely desire of other parents not to have their children present at such prayers, either because the prayers were too religious or not religious enough; and the wisdom of having public educational institutions stick to education and keep out of religion, with all the bickering that intrusion into the latter is likely to produce. The authorities acted well within their powers in concluding that plaintiffs must content themselves with having their children say these prayers before nine or after three; their action presented no such inexorable conflict with deeply held religious belief as in *Sherbert v. Verner, supra.* After all that the states have been told about

keeping the "wall between church and state . . . high and impregnable," *Everson v. Board of Education,* 330 U. S. 1, 18 (1947), it would be rather bitter irony to chastise New York for having built the wall too tall and too strong.

It was thus error to grant summary judgment to the plaintiffs. We think also that the case calls on us to direct judgment dismissing the complaint. Although denial of the defendants' motions to dismiss would not itself have been appealable, it goes without saying that the grant of summary judgment to the plaintiffs was a proper subject for appeal, 28 U. S. C. §1291, and 28 U. S. C. §2106 empowers us to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." Although we have found no authority directly on point, *First Nat'l Bank v. Maryland Cas. Co.,* 290 F. 2d 246, 251-52 (2 Cir.), cert. denied, 368 U. S. 939 (1961), is very close to being one. A further analogy is furnished by the settled rule, "Where, on an appeal from an order granting or continuing a temporary injunction, or from an order appointing a receiver, the equity of the bill is challenged and the attack upon it appears to be well founded, the power is conferred, and the duty is imposed, upon the appellate court to consider it, and if it is of the opinion that the relief sought by the bill cannot be granted, to so decide, and thus to save the parties to the suit further expense resulting from the endeavor to secure impossible relief." *Guardian Trust Co. v. Kansas City So. Ry.,* 171 Fed. 43, 51 (8 Cir. 1909) (Sanborn, J.), and cases cited; *Metropolitan Water Co. v. Kaw Valley Drainage District,* 223 U. S. 519, 523 (1912); *Triumph Hosiery Mills, Inc. v. Triumph Int'l Corp.,* 308 F. 2d 196, 200 (2 Cir. 1962); *Zentner v. American Fed'n of Musicians,* 343 F. 2d 758 (2 Cir. 1965). Plaintiffs' attorney has consistently maintained that all the facts are contained in the complaint and are before

the court; he did not indicate in argument that any facts warranting a different decision could be alleged or proved. Under these circumstances, we perceive no reason for not bringing this litigation to an end. See 6 Moore, *supra*, ¶¶56.12, 56.13, 56.27[2].

The jugment is reversed, with directions to dismiss the complaint.